

Letter of Findings: 08-0721
Gross Retail Tax
For the Years 2005, 2006, and 2007

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ISSUE

I. Lump Sum Contracts – Gross Retail Tax.

Authority: IC § 6-2.5-6-1; IC § 6-8.1-5-1(c); [45 IAC 2.2-4-26\(b\)](#); [45 IAC 2.2-6-8\(b\)](#).

Taxpayer argues that it was not required to collect sales tax on a portion of amounts paid by taxpayer's customers.

STATEMENT OF FACTS

Taxpayer is an Indiana business which manufactures *[sic]* and sells stone and brick veneer. The stone is manufactured to the individual customer's specifications. In addition to purchasing the manufactured stone, each customer has the option of paying taxpayer to install the stone. The Department of Revenue (Department) conducted an audit review of taxpayer's business records and determined that taxpayer was charging customers who paid to have the stone installed pursuant to a "lump sum contract" and charged sales tax on the retail price of the stone. The audit concluded that taxpayer had failed to remit the correct amount of sales tax and assessed taxpayer for the additional sales tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Lump Sum Contracts – Gross Retail Tax.

DISCUSSION

Taxpayer argues that it collected the correct amount of sales tax from its customers and the assessment of the additional tax is incorrect.

As a threshold issue, it is the taxpayer's responsibility to establish that the existing sales tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer explains that it has a number of major customers with whom it negotiates a pricing structure at the beginning of each year. With these particular customers, taxpayer explains that it charges an equal amount for the stone and an equal amount for the labor to install that same stone. For example, if a negotiated customer chooses stone that costs \$25, it will charge that customer \$25 to install the stone and bill the customer a total of \$50. On the invoice, taxpayer will not differentiate between the two charges; it simply bills customer \$50.

Taxpayer points to sample invoices which seem to attest to this arrangement. For example, taxpayer sends an invoice to customer which details various materials the cost of which totals \$1,000. There is no indication of a separate charge for services or for labor. Included on that same invoice is a charge of \$30 for tax. Assuming that the relevant sales tax was 6 percent at the time the transaction occurred, taxpayer argues that the \$1,000 charge represents the true cost of the material (\$500) and the cost of the labor (\$500) and that the sales tax was correctly calculated and assessed against the materials.

In support of this position, taxpayer's representative points to [45 IAC 2.2-4-26\(b\)](#) which states that:

A person selling tangible personal property to be used as an improvement to real estate may enter into a completely *[sic]* separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sales of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

Taxpayer concludes that because it entered into prior "separate contracts" – copies of which has not been produced – taxpayer was entitled to charge sales tax on the materials portion of the invoice even though that amount was not separately stated on the invoice. What appears to be a 3 percent tax charge for the entire amount, is actually a 6 percent charge for the materials.

However, the argument is ultimately irrelevant because the audit did not determine that taxpayer owed sales tax on the entire amount of these bundled transactions. As stated in the audit report, "[T]he audit determined that the taxpayer collected the sales tax on both time and material jobs and lump sum jobs, but failed to report all the sales tax collected." (Emphasis added). The Department's disagreement with the taxpayer was not whether or not it should have collected sales tax on lump sum contracts pursuant to [45 IAC 2.2-4-26\(b\)](#); the issue was whether taxpayer, having collected sales tax, was obligated to pay the total amount collected to the Department. Any

argument that it was not required to forward the amount collected is erroneous. Once collected, the tax was owed to Indiana. As stated in IC § 6-2.5-6-1, "[E]ach person liable for collecting the state gross retail or use tax shall file a return for each calendar month and pay the state gross retail and use taxes that the person collects during that month." Having collected the tax from its customers, "The amount determined... is the retail merchant's state gross retail and use tax liability regardless of the amount of tax he actually collects." [45 IAC 2.2-6-8\(b\)](#) (Emphasis added).

As the Department's audit initially determined, "The taxpayer failed to remit the total amount of the Sales Tax collected from their customers." Having collected sales tax from its customers, taxpayer may not retain any of that tax. Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c) of demonstrating that the "proposed assessment is wrong."

FINDING

Taxpayer's protest is denied.

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